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# The Crashworthiness Doctrine - A Search for a Rational Answer in Florida

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# COMMENTS

## THE CRASHWORTHINESS DOCTRINE—A SEARCH FOR A RATIONAL ANSWER IN FLORIDA

STEPHEN F. ROSSMAN\* AND JAMES S. BRAMNICK\*\*

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### I. INTRODUCTION

*Evans* and *Larsen*, continuing their national battle for supremacy . . . have enunciated "second collision" principles precisely poles apart. Their clashing concept as to the appropriate legal principle controlling manufacturers' liability for design defects producing enhanced injuries in motor vehicle accidents but not causing or contributing to the initial collision, has led to a new "War between the States" unsurpassed since 1865.<sup>1</sup>

As recently as 10 years ago, the terms "second accident" and "secondary impact" were relatively unknown. However, as noted above by one court, the past decade has produced one of the most serious conflicts in the history of the judiciary. Rarely have so many jurisdictions become so divided on one particular issue in so short a time.<sup>2</sup>

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1. *Frericks v. General Motors Corp.*, 20 Md. App. 518, —, 317 A.2d 494, 495 (Ct. Spec. App. 1974) (footnotes omitted).

2. The following jurisdictions have held that a manufacturer must produce a crashworthy vehicle:

#### California

*Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Badorek v. General Motors Corp.*, 12 Cal. App. 3d, 447, 90 Cal. Rptr. 305 (3d Dist. 1970).

#### District of Columbia

*Bremier v. Volkswagen of America, Inc.*, 340 F. Supp. 949 (D.D.C. 1972).

#### Florida

*Evancho v. Thiel*, 297 So. 2d 40 (Fla. 3d Dist. 1974).

#### Georgia

*Friend v. General Motors Corp.*, 118 Ga. App. 763, 165 S.E.2d 734 (1968), *cert. dismissed*, 225 Ga. 290, 167 S.E.2d 926 (1969).

The increasing surge of public interest in safety on our roads and highways has brought a sharp rise in the number of cases in which persons injured in motor vehicle accidents have sought to hold the

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Iowa

Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972).

Maryland

Volkswagen of America, Inc. v. Young, 321 A.2d 737 (Md. 1974).

Michigan

Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

New York

Bolm v. Triumph Corp., 41 App. Div. 2d 54, 341 N.Y.S.2d 846 (1973) (rule disputed at co-equal intermediate court level by Edgar v. Nachman, 37 App. Div. 2d 86, 323 N.Y.S.2d 5 (1971)).

Oregon

May v. Portland Jeep, Inc., 265 Ore. 307, 509 P.2d 24 (1973).

Pennsylvania

Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).

Rhode Island

Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974).

South Carolina

Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).

South Dakota

Engberg v. Ford Motor Co., — S.D. —, 205 N.W.2d 104 (1973).

Washington

Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974).

Wisconsin

Grundmanis v. British Motors Corp., 308 F. Supp. 303 (E.D. Wis. 1970).

The following courts have declared that there is no duty to manufacture a crashworthy automobile:

Illinois

Mieher v. Brown, 54 Ill.2d 539, 301 N.E.2d 307 (1973).

Indiana

Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir., *cert. denied*, 385 U.S. 836 (1966).

Mississippi

General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970); Walton v. Chrysler Corp., 229 So. 2d 568 (Miss. 1969).

Montana

Ford v. Ruppel, 504 P.2d 686 (Mont. 1972).

New Jersey

Devaney v. Sarno, 122 N.J. Super. 99, 299 A.2d 95 (1973).

manufacturer of the vehicle liable for those injuries which although resulting from a design defect, did not cause the accident itself.<sup>3</sup> Since the topic of the "uncrashworthy" automobile first received national attention in Ralph Nader's book, *Unsafe At Any Speed*,<sup>4</sup> hundreds of studies<sup>5</sup> have demonstrated the fact that defective design in motor vehicles has substantially contributed to the sharp increase in personal injuries and death as a result of automobile accidents.<sup>6</sup> Congress has also become involved in the field of defective automobile design,<sup>7</sup> although it seems that it will be at least a few years before any true substantive action is taken.<sup>8</sup>

The purpose of this article is to report and analyze the cases that have dealt with the secondary liability issue, to consider the Florida approach to the problem, and to analyze other rationales which have been cited in support of the crashworthiness doctrine.

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#### New York

Edgar v. Nachman, 37 App. Div. 2d 86, 323 N.Y.S.2d 53 (1971) (rule disputed at co-equal intermediate court level by Bolm v. Triumph Corp., 41 App. Div. 2d 54, 341 N.Y.S.2d 846 (1973)).

#### North Carolina

Bulliner v. General Motors Corp., 54 F.R.D. 479 (E.D.N.C. 1971); Alexander v. Seaboard Air Line R.R., 346 F. Supp. 320 (W.D.N.C. 1971).

#### Ohio

Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); Burkhard v. Short, 28 Ohio App. 2d 141, 275 N.E.2d 632 (1971).

#### Texas

General Motors Corp. v. Muncy, 367 F.2d 493 (5th Cir. 1966); Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967).

#### West Virginia

McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D.W. Va. 1971), *aff'd*, 472 F.2d 240 (4th Cir. 1973).

3. Thus the term "secondary impact" developed in cases where the unsafe design feature allegedly caused or worsened an injury rather than precipitated an accident. See Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967) [hereinafter cited as *Automobile Design*]; see generally Annot., 142 A.L.R.3d 560 (1972).

4. R. NADER, *UNSAFE AT ANY SPEED* (1965).

5. See, e.g., *Car Designs Allow Crash Fire Hazard*, 8 INS. INST. FOR HIGHWAY SAFETY (May 29, 1973).

6. The number of registered motor vehicles in the United States in 1972 totaled 121,400,000, while the number of accidents which were reported totaled 17,000,000. NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS* 40 (1973).

7. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C.A. §§ 1381-1431 (1974). At this time 48 motor vehicle safety standards have been established under the authority of this Act. See 49 C.F.R. §§ 501-80 (Supp. 1973). Section 571 sets forth the specific safety standards. For example, Standard No. 201 deals with occupant protection in interior impact and Standard No. 203 is concerned with impact protection for the driver from the steering control system.

8. See Comment, *The Liability of an Automobile Manufacturer for Failure to Design a Crashworthy Vehicle*, 10 WILLAMETTE L.J. 38 (1973) [hereinafter cited as *Crashworthy Vehicle*].

## II. AUTOMOBILE PRODUCTS LIABILITY IN GENERAL

The most important decision in automobile products liability law is *MacPherson v. Buick Motor Co.*<sup>9</sup> The question for determination in that case was whether the manufacturer owed a duty of care to any person but the immediate purchaser.<sup>10</sup> The court, speaking through Justice Cardozo, avoided the requirement of privity by concluding that the manufacturer was negligent rather than basing the decision on a contract theory. "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."<sup>11</sup> Therefore, the manufacturer will be held responsible for placing a defective automobile in the stream of commerce.

The courts since *MacPherson* have held that a manufacturer of automobiles is under a duty to construct a vehicle that is free of latent and hidden defects.<sup>12</sup> The theory of implied warranty came to the forefront in *Henningsen v. Bloomfield Motors*.<sup>13</sup> In that case, the court stated:

[U]nder modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.<sup>14</sup>

As the new concept of "strict liability" to the consumer began to develop, "warranty" soon proved to be an unsatisfactory and restricted basis for many types of actions.<sup>15</sup> The word "warranty" was therefore omitted when the strict liability section of the Second Restatement of Torts was proposed. The result was section 402A,<sup>16</sup> which has become

9. 217 N.Y. 382, 111 N.E. 1050 (1916).

10. *Id.* at 385, 111 N.E. at 1051. The immediate purchaser in this case was the retailer.

11. *Id.* at 389, 111 N.E. at 1053.

12. *Larsen v. General Motors Corp.*, 391 F.2d 495, 503 (8th Cir. 1968).

13. 32 N.J. 358, 161 A.2d 69 (1960).

14. *Id.* at 384, 161 A.2d at 84. Moreover,

[i]n a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars.

*Id.* at 387, 161 A.2d at 85.

15. See W. PROSSER, *THE LAW OF TORTS* § 98, at 656 (4th ed. 1971); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

16. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

one of two theories which courts normally accept when adopting the strict liability concept.

The other strict liability concept was espoused in *Greenman v. Yuma Power Products, Inc.*,<sup>17</sup> which involved a defective power tool. The court stated the rule to be that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."<sup>18</sup> The court held that in order to establish the manufacturer's liability, it was sufficient that the plaintiff proved he was injured while using the product in a way it was intended to be used. In a subsequent decision the California court held that since an injury was a result of a hidden defect in design and manufacture that made the product unsafe for its intended use,<sup>19</sup> strict liability should be applied to the automobile manufacturer.<sup>20</sup>

It is beyond dispute that the manufacturer of a product is under a duty of reasonable care to design it so that it will be reasonably safe for its intended use,<sup>21</sup> and if it is not so designed, the manufacturer will be found to have breached that duty.<sup>22</sup> The rule that has emerged is that the manufacturer is liable for negligence in the construction or sale of any product which may reasonably be expected to be capable of inflicting substantial harm if it is defective.<sup>23</sup>

The remaining question, however, is whether the automobile manufacturer is under a duty to protect the consumer from injury produced by design defects which do not cause collisions, but produce injury as a result of the impact. This is the concept of the "second accident."

### III. EVANS AND ITS PROGENY

The leading case denying recovery against the manufacturer for failure to produce a "crashworthy" vehicle is *Evans v. General Motors Corp.*<sup>24</sup> Plaintiff's decedent was fatally injured when the 1961 Chevrolet station wagon in which he was riding was struck broadside in an

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(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

17. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

18. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

19. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. The court stated that the purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

*Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

20. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

21. W. PROSSER, *THE LAW OF TORTS* § 96 (4th ed. 1971).

22. A design defect involves improper planning of the product's form or structural quality. In contrast, a defect in construction involves carelessness in the actual assembling of the product. *Crashworthy Vehicle*, *supra* note 8, at 40 n.8.

23. W. PROSSER, *THE LAW OF TORTS* § 96, at 643 (4th ed. 1971).

24. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966) [hereinafter referred to as *Evans*].

intersection. Plaintiff brought suit in federal district court alleging that the death was proximately caused by the use of X-frame construction in manufacturing the vehicle.<sup>25</sup> Plaintiff's complaint charged negligence, breach of implied warranty, and strict liability in tort.<sup>26</sup> The lower court dismissed all three counts for failure to state a claim upon which relief could be granted, and the decision was affirmed on appeal.

The majority of the court stated: "The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur."<sup>27</sup> The court indicated that a manufacturer is not under a duty to make an "accident-proof" vehicle and further noted that any requirement that a manufacturer construct a vehicle in which it would be safe to collide would be a legislative rather than a judicial function.<sup>28</sup>

The *Evans* decision, although adopted by approximately one-half of the courts that have considered the issue,<sup>29</sup> has been almost uniformly criticized by the commentators.<sup>30</sup> Generally, the criticism has centered on the fact that the majority of the court simply did not grasp the central issue in the case.<sup>31</sup> The main focus of the majority opinion was whether General Motors had a duty to manufacture an "accident-proof or fool-proof" automobile.<sup>32</sup> However, the real question, as stated by Judge Kiley in the dissent, is whether the manufacturer has a duty "to use such care in designing its automobiles that reasonable protection is given purchasers against death and injury from accidents which are expected and foreseeable yet unavoidable by the purchaser despite careful use."<sup>33</sup>

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25. Plaintiff's amended complaint incorporated a reprint of a publication in which a rival manufacturer advertised the alleged superiority of its perimeter frame over the "X" frame used by other automobile makers. 359 F.2d at 823.

26. *Id.* at 824.

27. *Id.* at 825.

28. *Id.* at 824.

29. See note 2 *supra*.

30. See Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); *Automobile Design*, *supra* note 3; Sklaw, "Second Collision" Liability: The Need for Uniformity, 4 SETON HALL L. REV. 499 (1973) [hereinafter cited as "Second Collision" Liability]; Comment, *Torts: Automobile Manufacturer's Liability for "Secondary Impact" Injuries*, 23 OKLA. L. REV. 296 (1970); Note, 19 AM. U. L. REV. 273 (1970); Note, 80 HARV. L. REV. 688 (1967); Note, 52 IOWA L. REV. 953 (1967); Note, 20 U. KAN. L. REV. 179 (1971); Note, 118 U. PA. L. REV. 299 (1969). But see Hoenig & Werber, *Automobile "Crashworthiness": An Untenable Doctrine*, 20 CLEV. ST. L. REV. 578, 1971 INS. L.J. 583 (1971); Pawlak, *Manufacturer's Design Liability: The Expanding Frontiers of the Law*, 19 DEFENSE L.J. 143 (1970).

31. See, e.g., *Crashworthy Vehicle*, *supra* note 8.

32. "A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all." 359 F.2d at 824.

33. *Id.* at 827. "A refusal to accept the dissent's characterization of the duty question would set the development of the common law of auto design back thirty years." *Automobile Design*, *supra* note 3 at 656.

A further weakness of the majority opinion's "accident-proof" proposition<sup>34</sup> is its sole reliance as authority on the New York case of *Campo v. Scofield*.<sup>35</sup> In *Campo* an "onion-topping" machine rather than an automobile caused the injury.<sup>36</sup> The court's attention in *Campo* was centered upon whether a manufacturer had a duty to design the machine with a safety guard to prevent injury to a user caused by a patent defect. This decision is very questionable authority concerning the frame design of a motor vehicle<sup>37</sup> in light of the great reliance on mass use of the automobile. It has been said that such a "latent defect rule is a completely unsound approach to design defect problems."<sup>38</sup>

It appears that the same decision could have been reached in *Evans* on the basis of insufficient evidence rather than the court's final determination that a manufacturer could not be held responsible under any circumstances for failure to guard against the possible results of automobile collisions.<sup>39</sup> The decision in *Evans* must therefore be viewed not only as poorly reasoned, but also as unnecessary.

Reasoning similar to that used in *Evans* was utilized in *Willis v. Chrysler Corp.*,<sup>40</sup> where summary judgment was granted in favor of the manufacturer. Willis was driving a police car when struck by another vehicle; the impact caused the 1963 Plymouth police vehicle to break into two sections killing all occupants.<sup>41</sup> The court stated that

34. See note 32 *supra*.

35. 301 N.Y. 468, 95 N.E.2d 802 (1950).

36. The plaintiff in *Campo* was engaged in feeding onions into the machine when his hands became caught in its revolving steel rollers and were badly injured. Plaintiff brought suit against the manufacturer alleging that it had been negligent in failing to equip the machine with a guard or stopping device. The Appellate Division ordered the complaint dismissed and the decision was affirmed by the Court of Appeals. *Id.*

Even assuming, though not conceding, *Campo* to be good law, the analogy to the standard of care owed in the manufacture of an *automobile* leaves something to be desired. The devastation caused by a defectively designed automobile, unleashed upon a society so totally dependent upon that vehicle, leads one to conjure catastrophes of gigantic proportions, hardly commensurate with those we foresee being caused by a defective "onion topper."

*Frericks v. General Motors Corp.*, 20 Md. App. 518, —, 317 A.2d 494, 507 (Ct. Spec. App. 1974) (dissenting opinion) (emphasis in original).

37. See "Second Collision" *Liability*, *supra* note 30, at 511 n.57.

38. *Askew v. Howard-Cooper Corp.*, 263 Ore. 184, 188, 502 P.2d 210, 212 (1972) (dissenting opinion). See also Houser, *Crashworthiness: Defective Product Design—Secondary Impact Liability in Texas*, 4 ST. MARY'S L.J. 303 (1972) [hereinafter cited as *Defective Product Design*]; "Second Collision" *Liability*, *supra* note 30. It should also be observed that *Campo* was decided in 1950, long before the trend in the judiciary to favor the consumer and the adoption of the theories of breach of implied warranty and strict liability in tort came into play. Compare, e.g., *Campo* with *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

39. Moreover,

[t]he [*Evans*] view based on "no duty" would allow the automotive industry to manufacture their automobile from egg shells and to use such designs as would guarantee certain death in every accident, regardless of severity. This position is plainly untenable.

*Defective Product Design*, *supra* note 38, at 307.

40. 264 F. Supp. 1010 (S.D. Tex. 1967).

41. Plaintiff contended that the defendant manufacturer breached an implied warranty of fitness because the design of the car allowed it to separate into two sections as a result of the collision.



the duty which an automobile manufacturer owes to the users of its product "does not extend to require a manufacturer to design his product so that it is accident proof or fool proof."<sup>42</sup> The court failed to recognize the fact that a manufacturer could be held responsible for providing reasonable protection to users of its vehicles from foreseeable accidents while not being held to a duty to design and construct an accident proof automobile. As authority for this proposition, the court relied on *Gossett v. Chrysler Corp.*<sup>43</sup> and *Evans v. General Motors Corp.*<sup>44</sup>

In *Gossett*, the plaintiff was driving a new Dodge truck when its hood became disengaged and flew up in front of the plaintiff, thereby obscuring his vision. The plaintiff lost control of the vehicle as a result of the hood's disengagement and suffered severe injuries. The sole issue presented was whether there was negligence on the part of the manufacturer in the design of the hood latch.<sup>45</sup> It can clearly be seen that the court in *Gossett* was not concerned with a "secondary accident" but rather a simple case of negligent design. Further, the court specifically noted that under Ohio law, which was applicable to the case, an automobile is not regarded as a dangerous instrumentality per se.<sup>46</sup>

The *Evans* and *Willis* decisions are the most frequently cited authorities for the determination by courts that a manufacturer has no duty to produce a crashworthy vehicle. From the above discussion, two propositions should be evident. First, both the *Evans* and *Willis* decisions are based on authority which is somewhat questionable. It is submitted that the various courts which have followed the two cases have not analyzed the decisions in depth and the "no duty" proposition has thus continued to spiral on a faulty premise. Second, in states such as Florida where the automobile is considered a dangerous instrumentality per se<sup>47</sup> and where the courts have been increasingly liberal in the area of products liability,<sup>48</sup> the "no duty" theory of manufacturer liability should not be applicable.

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42. 264 F. Supp. at 1011. It should be noted that there apparently was no evidence that the design of the vehicle was defective or contributed to the splitting apart in any respect. Further, this holding was confined to a "high speed collision" and it is doubtful that the court would reach the same result if the impact speed had been greatly reduced. *Defective Product Design*, *supra* note 38, at 308.

43. 359 F.2d 84 (6th Cir. 1966).

44. 359 F.2d 822 (7th Cir. 1966).

45. The court reversed a jury verdict in favor of the plaintiff and stated that [i]t is the duty of a manufacturer to use reasonable care under the circumstances to so design his product as to make it not accident or fool proof, but safe for the use for which it is intended. This duty includes a duty to design the product so that it will fairly meet any emergency of use which can reasonably be anticipated. The manufacturer is not an insurer that his product is, from a design viewpoint, incapable of producing injury.

*Gossett v. Chrysler Corp.*, 359 F.2d 84, 87 (6th Cir. 1966).

46. *Id.* at 88.

47. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

48. See Hicks & Sternlieb, *Products Warranty Law in Florida—A Realistic Overview*, 25 U. MIAMI L. REV. 241 (1971).

The *Evans* theory was again accepted in *Schemel v. General Motors Corp.*<sup>49</sup> The plaintiff sought recovery against General Motors for manufacturing and putting into the stream of commerce motor cars with a capacity to be operated at speeds in excess of 100 miles per hour. Plaintiff had been seriously injured when the automobile in which he was riding was struck by a vehicle manufactured by the defendant and being driven at a speed of approximately 115 miles per hour. The Court of Appeals for the Seventh Circuit, finding that the manufacturer was not responsible, held that the vehicle in question was not dangerous for its lawful use, *i.e.*, the purpose for which it was supplied. Judge Kiley again dissented and stated that he would hold that:

General Motors had the duty to foresee that if it designed its product with a speed capacity far exceeding any legal limit and emphasized that capacity in its advertising, recklessly inclined drivers would be encouraged to put that capacity to abnormal use and expose innocent persons like Schemel to the unreasonable risk that what happened would happen.<sup>50</sup>

The most recent case adopting the *Evans* position is *Frericks v. General Motors Corp.*<sup>51</sup> Plaintiff was a passenger in a 1969 Opel Kadett two-door sedan. The driver of the vehicle operated it at an excessive speed and caused it to run off the road and overturn. Plaintiff alleged that after the car overturned the roof supports collapsed and gave way, unable to support the weight of the vehicle. At the same time, the seat mechanism in which the plaintiff was reclining at a five degree angle failed and dropped rearward to an 80 degree angle. These two conditions were said to combine to cause a second impact between the plaintiff passenger's head and the collapsing roof, crushing his skull and causing greatly enhanced injury and damage. The complaint sounded in negligence, breach of implied warranty and strict liability in tort.<sup>52</sup>

The court examined both *Evans* and *Larsen v. General Motors Corp.*<sup>53</sup> and decided to follow the former rather than the latter.<sup>54</sup> The majority opinion appears to have been based on the theory that "so complex and universal a problem should be left to legislative decision."<sup>55</sup> However, as noted by Judge Lowe in the dissent: "[T]he possibility of future adequate legislative standards does not remove the necessity of presently deciding whether plaintiff should or should not

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49. 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

50. *Id.* at 810 (dissenting opinion).

51. 20 Md. App. 518, 317 A.2d 494 (Ct. Spec. App. 1974).

52. *Id.* at —, 317 A.2d at 498-99.

53. 391 F.2d 495 (8th Cir. 1968).

54. 20. Md. App. at —, 317 A.2d at 499.

55. *Id.* at —, 317 A.2d at 500. The court noted that 18 months prior to the *Larsen* decision, Congress passed the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (Supp. 1972), and that this Act should serve as a precedent to further legislative action in the area.

have an opportunity to prove the allegations made in the complaint."<sup>56</sup> Moreover, "[j]uror's judgments would, at best, provide invaluable indicia of consumer expectations to those legislators formulating standards, and, at worst, would provide a spur to the representatives of the people to get on with their task."<sup>57</sup>

The *Frericks* court also adopted the *Evans* proposition that the "intended use" of a motor vehicle does not include its participation in collisions with other objects.<sup>58</sup> It is submitted that this interpretation of the "intended use" doctrine<sup>59</sup> is much too narrow.<sup>60</sup> While the intended use of the automobile does not specifically include its participation in collisions, it is, however, clearly a foreseeable danger arising out of the intended use.<sup>61</sup> This foreseeability aspect is supported by statistics.<sup>62</sup> It is clear that the manufacturers are not and cannot be insurers of the vehicles, but it should be just as clear that they must be held to a standard of reasonable care in the design of their product to provide a reasonably safe vehicle in which to travel. One court has stated the rule alternatively as either that vehicular accidents are so commonplace as to constitute a readily foreseeable misuse of motor vehicles or that vehicular accidents are incidental to the normal and intended use of motor vehicles on today's highways.<sup>63</sup>

Under this approach to the concept of intended purpose and normal use, the manufacturer would not be held liable for the vicissitudes of using a passenger automobile on a racetrack or a plowed field, for example, but might be held liable for the foreseeable, though accidental, traumatic consequences of the use of passenger cars on highways by occupants.<sup>64</sup>

The Maryland Court of Appeals implicitly overruled *Frericks* in *Volkswagen of America v. Young*.<sup>65</sup>

#### IV. THE LARSEN APPROACH

The backbone of the cases imposing a duty upon the manufacturer to design a "crashworthy" automobile is *Larsen v. General*

56. 20 Md. App. at —, 317 A.2d at 507, quoting *Evans v. General Motors Corp.*, 359 F.2d 822, 828 (7th Cir. 1966) (dissenting opinion).

57. 20 Md. App. at —, 317 A.2d at 507.

58. *Id.* at —, 317 A.2d at 505.

59. As a general rule, the manufacturer has a duty to use reasonable care under the circumstances in the design of a product but is not an insurer that his product is incapable of producing injury. This duty of design is met when the article is safe for its intended use and when it will fairly meet any "emergency of use" which is foreseeable. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). See generally Annot., 42 A.L.R.3d 560 (1972).

60. Cf. *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974).

61. W. PROSSER, *THE LAW OF TORTS* § 96, at 646 (4th ed. 1971); *Larsen v. General Motors Corp.*, 391 F.2d 495, 502-03 (8th Cir. 1968).

62. The chances of an automobile becoming involved in an accident are slightly less than 1.5 in 10. See note 6 *supra*.

63. *Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1072-1073 (E.D. Pa. 1969).

64. *Id.* at 1073.

65. 321 A.2d 737 (Md. 1974).

*Motors Corp.*<sup>66</sup> While driving a 1963 Chevrolet Corvair, plaintiff received serious injuries when a head-on collision caused a severe rearward thrust of the steering mechanism into his head. The complaint alleged negligence in the design of the steering assembly, a failure to warn of such latent dangerous condition, and breach of express and implied warranties of merchantability for the vehicle's intended use.

The Court of Appeals for the Eighth Circuit analyzed all of the propositions propounded by *Evans* and flatly rejected them. The court decided that the interpretation of "intended use" by General Motors<sup>67</sup> was much too narrow and unrealistic.<sup>68</sup> The *Larsen* court stated that "the intended use of an automotive product contemplates its travel on crowded and high speed roads and highways that inevitably subject it to the foreseeable hazards of collisions and impacts."<sup>69</sup> Thus the court concluded that there was no sound reason why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle to minimize the effect of accidents. At the very least, thought the court, the unreasonable risk should be eliminated and reasonable steps should be taken in design to minimize the injury-producing effect of impacts.<sup>70</sup>

As to the second count of the complaint, the *Larsen* court held that "[t]he failure to use reasonable care in design or [the discovery] of a defective design gives rise to the reasonable duty on the manufacturer to warn of this condition."<sup>71</sup>

The *Larsen* decision was followed in the case of *Mickle v. Blackmon*.<sup>72</sup> Plaintiff was a passenger in a 1949 Ford which was involved in a collision with another vehicle. Plaintiff was impaled on the gearshift lever as a result of the accident, causing permanent paralysis. The evidence indicated that the gearshift knob became fragile due to the effects of sunlight and had shattered upon impact

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66. 391 F.2d 495 (8th Cir. 1968) [hereinafter referred to as *Larsen*].

67. Defendant General Motors contended that it had no duty to produce a vehicle in which it is safe to collide or which is accident-proof or incapable of injurious misuse. It viewed its duty as extending only to producing a vehicle that is reasonably fit for its intended use, or for the purpose for which it was made, and that is free from hidden defects. G.M. further propounded that the intended use of a vehicle and the purpose for which it is manufactured does not include its participation in head-on collisions or any other type of impact, regardless of the manufacturer's ability to foresee that such collisions may occur. *Id.* at 498.

68. *Id.* at 502.

69. *Id.* at 504.

70. *Id.* at 503.

71. *Id.* at 505. The court relied in this context on RESTATEMENT (SECOND) OF TORTS § 395, comment *f* (1965), which states:

The particulars in which reasonable care is usually necessary for protection of those whose safety depends upon the character of chattels [includes] the making of such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure the production of a safe article . . . .

72. 252 S.C. 202, 166 S.E.2d 173 (1969) [hereinafter referred to as *Mickle*].

with the body of the plaintiff.<sup>73</sup> The court held that a manufacturer owes a duty of reasonable care to minimize the risk of death or serious injury to collision victims.<sup>74</sup> One of the obvious reasons for the court's holding in this case was the fact that the entire incident might have been avoided by a minor, inexpensive change—the substitution of a black knob for a white one which would have resisted deterioration from sunlight.

Both the *Larsen* and *Mickle* cases were decided on the basis of general negligence principles. The transition from negligence to strict liability<sup>75</sup> began in *Grundmanis v. British Motor Corp.*<sup>76</sup> The basis of the plaintiff's claim was that the defendant was negligent in the design of the vehicle because the fuel tank was located under the trunk and immediately behind the passenger compartment. The MGB automobile burst into flames upon impact with another vehicle when its fuel tank ruptured. The court noted that Wisconsin had recently determined that products liability cases are to be governed by strict liability in tort.<sup>77</sup> In denying a motion to dismiss, the court approved the reasoning of *Larsen* and specifically rejected the *Evans* approach, thereby finding it unnecessary to discuss the strict liability doctrine. The court's decision was clearly based on its belief that the foreseeability of accidents is a matter of public and common knowledge. It believed that the manufacturer must accept the duty of protecting the user from unreasonable risk of injury due to negligence in design.<sup>78</sup>

The *Larsen* rationale was approved in *Dyson v. General Motors Corp.*,<sup>79</sup> where the plaintiff was injured when the roof of his 1965 Buick Electra collapsed after the vehicle overturned.<sup>80</sup> The court, in denying a motion for judgment on the pleadings, upheld the plaintiff's theories of negligence and strict liability based on section 402A of the Restatement (Second) of Torts.<sup>81</sup> The court determined that

[I]t is the obligation of an automobile manufacturer to provide more than merely a movable platform capable of trans-

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73. The evidence further revealed that Ford had changed its practice one year after the manufacture of the automobile and had begun to paint the knobs a different color to avoid deterioration.

74. The court stated that it is a matter of common knowledge that a significant proportion of all automobiles produced in this country are involved in collisions at some time during their use. 252 S.C. at 230, 166 S.E.2d at 185.

75. See "*Second Collision*" Liability, *supra* note 30.

76. 308 F. Supp. 303 (E.D. Wis. 1970).

77. *Id.* at 306.

78. *Id.*; cf. *Gray v. General Motors Corp.*, 434 F.2d 110 (8th Cir. 1970) (implicitly accepting the trial court's instruction on a strict liability concept). See also "*Second Collision*" Liability, *supra* note 30.

79. 298 F. Supp. 1064 (E.D. Pa. 1969).

80. Four theories of liability were alleged: (1) negligence in design and manufacture; (2) breach of express and implied warranties of fitness; (3) strict liability; and (4) conscious or negligent misrepresentation. *Id.* at 1066.

81. See note 16 *supra*.

porting passengers from one point to another. The passengers must be provided a reasonably safe container within which to make the journey.<sup>82</sup>

Similarly, in *Badorek v. General Motors Corp.*,<sup>83</sup> a Rambler automobile struck the rear end of a 1965 Corvette Sting Ray in which the plaintiffs were passengers. The impact of the two cars caused the fuel tank of the Corvette to rupture, resulting in a gasoline fire which caused death and serious injury. The court held that automobile manufacturers are strictly liable for secondary or enhanced injuries caused by "unreasonably dangerous defective design and construction of their products under the conditions described in section 402A."<sup>84</sup>

The case of *Passwaters v. General Motors Corp.*<sup>85</sup> is noteworthy because it involved a situation where the plaintiff collided with an uncrashworthy automobile as opposed to riding in it.<sup>86</sup> Plaintiff was a passenger on a motorcycle which collided with a Buick Skylark. Plaintiff's leg was severely mangled when it came into contact with the wheel cover of the Buick. The cover consisted of unshielded metal flippers which spun when the wheel rotated. The Court of Appeals for the Eighth Circuit reversed a directed verdict for General Motors. In holding that the Iowa courts would apply the doctrine of strict liability to a person in the plaintiff's status, the federal court concluded that although the specific injury and the manner in which it occurred may have been difficult to foresee, nevertheless the unshielded operation of propeller-like blades on the four wheels of an automobile created a high risk of foreseeable harm to the general public.<sup>87</sup>

One of the most recent decisions outside Florida to join the growing number of courts that follow the *Larsen* approach is *Turcotte v. Ford Motor Co.*<sup>88</sup> Plaintiff filed suit to recover for the wrongful death of his son. The decedent was a passenger in a 1970 Maverick

82. 298 F. Supp. at 1073.

83. 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (3d Dist. 1970).

84. *Id.* at 925, 90 Cal. Rptr. at 320. Moreover, the court stated that the rationale of *Evans* is difficult to follow:

[T]o manufacture an automobile which is accident proof is an obvious impossibility—to say so is to express a truism. To adopt that truism as the basis for a rule that, therefore, under the law of negligence, there is no duty to exercise care to design a "safer" automobile is a non sequitur. *It confuses crash-proof with crash-worthiness.*

*Id.* at 919, 90 Cal. Rptr. at 316 (emphasis added). See also *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

85. 454 F.2d 1270 (8th Cir. 1972).

86. See *Crashworthy Vehicle*, *supra* note 8.

87. 454 F.2d at 1275-76. The court also maintained that, although "[a] vehicle cannot be made accident free . . . it is now recognized that a manufacturer does hold a duty to exercise a reasonable degree of care to make the car itself inherently danger free." *Id.* at 1276. *Contra*, *Kahn v. Chrysler Corp.*, 221 F. Supp. 677 (S.D. Tex. 1963), where a seven-year-old child drove his bicycle into the rear of a 1957 Dodge striking his temple upon the rear fin of the vehicle. The court granted summary judgment for the defendant and stated that "the manufacturer has no obligation to so design his automobile that it will be safe for a child to ride his bicycle into it while the car is parked." *Id.* at 679.

88. 494 F.2d 173 (1st Cir. 1974).

when the vehicle was struck by another car and burst into flames. Plaintiff contended that Ford's positioning of the gas tank in the Maverick in such manner that the tank's top also served as the floor of the trunk constituted a defect in design which caused his son's death by fire. The lower court awarded judgment to the plaintiff which was affirmed on appeal. The court agreed with the trial judge that the Rhode Island courts would adopt the *Larsen* interpretation of "intended use" in construing the doctrine of strict products liability.<sup>89</sup>

#### V. THE FLORIDA VIEWPOINT

Florida is one of the more recent jurisdictions to approve the crashworthiness doctrine as originally propounded in *Larsen*. In *Evancho v. Thiel*,<sup>90</sup> the District Court of Appeal, Third District, held that an automobile manufacturer may be liable for negligence and breach of implied warranty<sup>91</sup> where a defect in manufacture causes injury to a user as a result of a collision, even though the defect was not a cause of the collision. The plaintiff alleged in her complaint that she was injured by reason of a negligent design or manufacturing defect in a car produced and sold by the defendant, Ford Motor Co. The plaintiff's 1970 Mercury Montego was involved in a collision with another vehicle. As a result of the impact, a passenger in the rear seat of the Montego was thrown forward and struck the back of the front seat. Upon impact, not only did the locking mechanism designed to lock the front seat to the right rail (which was mounted on the floor) fail, causing the right side of the front seat to be thrown forward, but as the seat moved forward, sharp and pointed edges of the rail were exposed as well. The complaint averred that after striking the back of the front seat, the passenger's body fell to the floor of the automobile and his head struck the exposed sharp edges of the rail, ultimately causing his death.<sup>92</sup>

The lower court in *Evancho* dismissed the complaint for failure to

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89. *Id.* at 181.

A literal *Evans*-type interpretation of "intended use" fails to recognize that the phrase was first employed in early products-liability cases . . . merely to illustrate the broader central doctrine of foreseeability. The phrase was not meant to preclude manufacturer responsibility for the probable ancillary consequences of normal use. . . . Instead, a manufacturer "must also be expected to anticipate the environment which is normal for the use of his product and . . . he must anticipate the reasonably foreseeable risks of the use of his product in such an environment."

*Id.*, quoting *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83-84 (4th Cir. 1962). *Accord*, *Bremier v. Volkswagen of America, Inc.*, 340 F. Supp. 949 (D.D.C. 1972).

90. 297 So. 2d 40 (Fla. 3d Dist. 1974), *petition for cert. filed*, No. 73-764 (January 26, 1974) [hereinafter referred to as *Evancho*].

91. The cause of action mentioned by the court would be based upon breach of an implied warranty of merchantability. If an automobile manufacturer is placed under a duty to provide a crashworthy vehicle under the premise that accidents are foreseeable, an automobile that enhances injuries in a collision would be deemed to be unfit for the ordinary purpose for which such vehicle is used. *See generally* Hicks & Sternlieb, *Products Warranty Law in Florida—A Realistic Overview*, 25 U. MIAMI L. REV. 241 (1971).

92. 297 So. 2d at 42.

state a cause of action against Ford. The Third District, noting that no Florida case had yet decided the point, reversed the dismissal.<sup>93</sup> The court noted that the reasoning in *Larsen* was more in keeping with the law of Florida.<sup>94</sup> It should be noted that the deceased in *Evancho*, although a passenger or user of the vehicle, was apparently not the purchaser of the automobile. Since the court made no mention of privity, the fact that it expressly held that the manufacturer could be held liable for breach of an implied warranty could be viewed as another breakthrough in the field of warranty in Florida. However, it is more likely that this will be interpreted as falling within the "dangerous instrumentality" exception to the privity requirement.<sup>95</sup>

In keeping with the increasingly consumer-oriented atmosphere created by the Florida courts, the *Evancho* decision is approved as being the more modern and realistic approach. The court in *Evancho* adopted the *Larsen* approach but gave few reasons and cited few authorities for its final determination. There are, however, a variety of grounds for a Florida court to adopt *Larsen* rather than *Evans*.

First of all, one of the major reasons for following the "no duty" theory has been that such a drastic change is for the legislature and not the judiciary.<sup>96</sup> This argument may easily be dismissed in Florida, as the courts in this state have traditionally been in the forefront of judicial action despite the fact that the legislature has not previously acted in the area.<sup>97</sup>

A second major reason in support of the crashworthiness doctrine in Florida is that the automobile in this state is considered a dangerous instrumentality per se.<sup>98</sup> Many jurisdictions are not in accord with that view.<sup>99</sup> It should thus be clear that when a motor vehicle is operated

93. The court certified the following question to the Supreme Court of Florida as a matter of great public interest:

Whether a manufacturer of automobiles may be liable to a user of the automobile for a defect in manufacture which causes injury to the user when the injury occurs as the result of a collision and the defect did not cause the collision.

Petition for cert. filed, No. 73-764 (January 26, 1974).

94. 297 So. 2d at 44.

95. See *Keller v. Eagle Army-Navy Dep't Stores, Inc.*, 291 So. 2d 58 (Fla. 4th Dist. 1974); *Toombs v. Fort Pierce Gas Co.*, 208 So. 2d 615 (Fla. 1968); *Marrillia v. Lyn Craft Boat Co.*, 271 So. 2d 294 (Fla. 2d Dist. 1973). For a discussion of this subject, see Hicks & Sternlieb, *Products Warranty Law in Florida—A Realistic Overview*, 25 U. MIAMI L. REV. 241 (1971).

96. *E.g.*, *Frericks v. General Motors Corp.*, 20 Md. App. 518, 317 A.2d 494 (Ct. Spec. App. 1974); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966).

97. For example, Florida was the first state to allow joinder of an insurance carrier without legislative action. *Shingleton v. Bussy*, 223 So. 2d 713 (Fla. 1969). Florida courts also have adopted the doctrine of comparative negligence despite the argument that such a drastic shift is for the legislature. *Hoffman v. Jones*, 287 So. 2d 431 (Fla. 1973). See also Baumgardner v. American Motors Corp., — Wash. —, 522 P.2d 829 (1974), wherein the court stated:

[W]e reject the manufacturer's argument . . . that the court cannot impose such a standard of conduct upon a manufacturer, but must defer to legislative action . . . This overlooks the elementary concept that determination of the existence or nonexistence of a duty is always the function of the court.

*Id.* at 833.

98. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920); *Keller v. Eagle Army-Navy Dep't Stores, Inc.*, 291 So. 2d 58 (Fla. 4th Dist. 1974).

99. *E.g.*, Ohio. See text accompanying note 46 *supra*.



on a public highway, Florida courts recognize that an instrumentality is being used which can cause serious harm or injury to other users of the road, drivers and pedestrians alike. Although the dangerous instrumentality doctrine is used in Florida to hold the owner of the vehicle vicariously responsible for the acts of the operator while using the automobile with his knowledge, permission and consent, it should be equally clear that the automobile is not only a dangerous instrumentality to victims of the operator's negligence, but also a dangerous instrumentality for the purpose of holding the manufacturer liable.<sup>100</sup> Extending this further, the automobile is considered a dangerous instrumentality because accidents are foreseeable. When an automobile is involved in an accident, serious injury and death are likely to occur. Thus, with this understanding, the manufacturer should be under a duty to produce a motor vehicle which will be *reasonably* safe to human beings when involved in a collision.<sup>101</sup> The word "reasonably" must be stressed because obviously the manufacturer cannot be an insurer of his product and thus is under no obligation to produce an accident proof vehicle. However, it is submitted that the manufacturer is not unduly burdened by the imposition of a duty to produce a reasonably crashworthy automobile. It should be noted that the test of reasonableness is also significant when a court accepts a cause of action based upon section 402A. According to this section, the product must be sold in a "defective condition *unreasonably* dangerous to the user or consumer."<sup>102</sup>

Furthermore, the Florida courts have traditionally been in the forefront in the field of products liability, and have been increasingly consumer oriented.<sup>103</sup> For example, in *Matthews v. Lawnlite Co.*,<sup>104</sup> the plaintiff sued the manufacturer for injuries that occurred when he sat in an aluminum rocking chair and his finger was cut off by the moving parts of the chair as it extended over the armrest. The Supreme Court of Florida held that a manufacturer is under a duty to design its product to be safe for use. *Matthews* has been the leading case holding that a product, although not a dangerous instrumentality per se, can subject the manufacturer to liability if a user sustains an injury as a result of an inherently dangerous condition in an otherwise innocent looking instrumentality.<sup>105</sup>

100. See generally 3 FLA. JUR. *Automobiles & Other Motor Vehicles* § 152 (1955).

101. The general test of foreseeability in Florida was stated in *Pinkerton-Hays Lumber Co. v. Pope*, 127 So. 2d 441, 442-43 (Fla. 1961):

[F]oreseeability depends in part on whether the *type* of negligent act involved in a particular case has so frequently previously resulted in the *same type* of injury or harm that "in the field of human experience" the same type of result may be expected again. The test was not intended to . . . imply that a plaintiff, in order to recover in a negligence action, must *prove* that the *particular* causative act had frequently occurred before, and that it had frequently resulted in the same *particular* injury to the plaintiff.

102. See note 16 *supra*.

103. See generally Hicks & Sternlieb, *Products Warranty Law in Florida—A Realistic Overview*, 25 U. MIAMI L. REV. 241 (1971).

104. 88 So. 2d 299 (Fla. 1956).

105. "Dangerous instrumentalities have been defined as those which by nature are reason-

In *Keller v. Eagle Army-Navy Department Stores, Inc.*,<sup>106</sup> a Florida court for the first time expressly adopted the section 402A<sup>107</sup> strict liability theory in products liability law.<sup>108</sup> Plaintiff was a minor who sustained serious burns resulting from the explosion of a mosquito repellent device called a "Glo-Lite." The torch had been lit in accordance with the instructions contained thereon and had been handled in a manner consistent with its intended use.<sup>109</sup> In holding that the plaintiff had adduced sufficient evidence tending to show that the torch in question was improperly and dangerously designed and constructed, the court stated that section 402A represented the proper rule of law to be applied in such a situation.<sup>110</sup> Moreover,

Florida has long recognized that certain instrumentalities are "dangerous instrumentalities" *per se*, such as automobiles driven on the highways . . . and strict liability has been imposed upon the owner thereof for their improper use.<sup>111</sup>

It seems clear that the manufacturer of a dangerous instrumentality *per se*, such as an automobile, should be subject to liability for defects unknown to the consumer which can enhance injuries in an accident.<sup>112</sup>

One practical consideration that may affect the crashworthiness doctrine in a jurisdiction such as Florida is the doctrine of comparative negligence. Any negligence on the part of the plaintiff in operating the vehicle then becomes a matter of degree. One example in this particular area is the use of seat belts. If the plaintiff's injuries are enhanced by striking an object in the vehicle as the result of a collision, may evidence be introduced to show that the plaintiff failed to use the seat belts that are provided in the automobile?<sup>113</sup> If so, it is quite possible that the jury would reduce the plaintiff's recovery or find that the plaintiff was completely responsible for his enhanced injuries. Unless seat belt use becomes mandatory, either by federal or state legislation, it will be very difficult if not impossible for a manufacturer to win a crashworthiness case. However, this should not preclude a court from imposing upon the manufacturer the duty to produce a crashworthy

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ably certain to place life and limb in peril when negligently constructed such as airplanes, automobiles, guns and the like." *Id.* at 301.

106. 291 So. 2d 58 (Fla. 4th Dist. 1974).

107. See note 16 *supra*.

108. Prior to this, strict liability was considered applicable in Florida only by implication. See *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307 (Fla. 3d Dist.), *cert. denied*, 211 So. 2d 214 (Fla. 1968).

109. 291 So. 2d at 59.

110. *Id.* at 61.

111. *Id.* at 60.

112. See also *Toombs v. Fort Pierce Gas Co.*, 208 So. 2d 615 (Fla. 1968), where the Supreme Court of Florida found liability, absent privity, for breach of warranty involving a dangerous instrumentality (a propane gas storage tank). Plaintiff in this case was an innocent bystander.

113. For a full discussion on seat belts, see Comment, *The Medical and Legal Problems Arising From the Failure to Wear Seat Belts*, 27 U. MIAMI L. REV. 130 (1972).

vehicle. The practical effect of the use or nonuse of seat belts does not outweigh the potentially dangerous effect of allowing an automobile manufacturer to design a vehicle in any manner it chooses. Rather it should be considered as an element of damages.

The only Florida decision that can directly lend support to the *Evancho* decision is *Noonan v. Buick Co.*<sup>114</sup> Plaintiff was operating an Opel Kadett manufactured by the defendant when plaintiff's three-year-old son grabbed the steering wheel, thus causing the vehicle to veer sharply to the right and begin to skid. When plaintiff quickly turned the wheel to adjust for the skid, the driver's seat suddenly catapulted him forward and upward causing plaintiff's head to strike the frame and roof of the automobile, resulting in serious injuries. It was alleged that the defendant negligently failed to properly secure the seat to the floor or provide a locking mechanism.<sup>115</sup> The trial judge dismissed the complaint with prejudice, holding that the act of plaintiff's minor son was the proximate cause of the accident and not reasonably foreseeable by the defendant. In reversing the dismissal, the District Court of Appeal, Third District, stated that it could not be said that, as a matter of law, plaintiff's injury was not a foreseeable result of the alleged negligence of the defendant. A jury could find that the injury resulted from the alleged negligence rather than the act which caused the emergency.<sup>116</sup>

One final theory which supports the crashworthiness doctrine is the adoption of section 398 of the Restatement (Second) of Torts which provides:

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.<sup>117</sup>

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114. 211 So. 2d 54 (Fla. 3d Dist. 1968).

115. The plaintiff's complaint alleged that the defendant was negligent in that:

[T]he defendant knew or in the exercise of reasonable care should have known that any sudden, erratic movement of said automobile would cause the driver's seat to thrust upward and forward, and having such knowledge the defendant carelessly and negligently failed to properly secure said seat to the floor or provide a locking mechanism therefor.

*Id.* at 55.

116. *Id.* See also *Holman v. Ford Motor Co.*, 239 So. 2d 40 (Fla. 1st Dist. 1970). In *Holman*, plaintiff sued for damages when he rammed his 1966 Thunderbird into a parked vehicle to avoid hitting pedestrians after his brakes failed. After owning the car one year, plaintiff brought the car to the dealer to have the brakes repaired. Ford delivered to the dealer a new power brakes booster system which is a sealed, self-contained device. The unit was installed without alteration by the dealer and the car was tested by the dealer's employees. The car was returned to the plaintiff and minutes later the brakes failed again. The court held that refusal to instruct the jury on the doctrine of *res ipsa loquitur* with respect to the booster unit prejudicially deprived plaintiff of an essential substantive theory of recovery.

117. RESTATEMENT (SECOND) OF TORTS § 398 (1965). This doctrine was approved in Florida in *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956).

It should be clear that an automobile which contains design defects which do not initiate an accident but contribute to increasing the injuries can be, if so found by the trier of fact, a "failure to exercise reasonable care in the adoption of a safe plan or design." In order for this to be determined, therefore, the question of law<sup>118</sup> as to whether an automobile manufacturer *may* be liable where a defect in manufacture enhances injuries after an accident occurs, *must* be answered in the affirmative.

## VI. CONCLUSION

The *Evans* court and the jurisdictions which subsequently adopted the "no duty" rules are correct to the extent that they stand for the proposition that a manufacturer should not be required to produce a crashproof vehicle. But the line must be drawn at crashproof, not crashworthy. If the state of the art of the automobile industry is such that a manufacturer has the ability or technical knowledge to prevent certain foreseeable situations arising out of ordinary accidents, then they should be held accountable to the consumer for failing to incorporate this knowledge into the product they place in the stream of commerce.

Certainly in Florida where the automobile is a "dangerous instrumentality" there is no question that the manufacturer owes to the ultimate user of said vehicle and, probably, to innocent bystanders<sup>119</sup> a duty to produce a vehicle which is designed to be reasonably safe. To the extent that accidents are foreseeable and that subsequent and more serious second accidents are also foreseeable, this duty should extend to the manufacturer to act reasonably to prevent and reduce the potential danger of the second accident.

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118. The sole point that *all* courts seem to agree on is that this is a question of law. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966). In *Baumgardner v. American Motors Corp.*, — Wash. —, —, 522 P.2d 829, 833 (1974), the court stated:

We strongly disavow the notion that the judicial system is incapable of dealing with a technical issue simply because it may involve testimony from expert witnesses. That is a common experience which judges and juries deal with daily. The strength of the system is that it has absorbed, accommodated and resolved disputes of immense complexity and novelty.

119. See *Toombs v. Fort Pierce Gas Co.*, 208 So. 2d 615 (Fla. 1968).